No. 16058

United States Court of Appeals

FOR THE NINTH CIRCUIT

SELDEN G. HOOPER,

Appellant,

vs.

C. C. HARTMAN, Rear Admiral USN, Commandant, Eleventh Naval District,

Appellee.

APPELLANT'S OPENING BRIEF

Appeal from the United States District Court for the Southern District of California Southern Division

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STATEMENT OF JURISDICTION

Jurisdiction of the action was in the District Court by virtue of United States Code, Title 28, Sec. 1331, 62 Stat. 930, there being involved in the matter in controversy a sum in excess of $3,000.00, exclusive of

interest and costs, involving a question arising under the Constitution and laws of the United States, (Clk's Tr., p. 11).

The question arising under the laws of the United States pertains to the constitutionality of 50 U.S.C., Sec. 552(4);--64 Stat. 109-- commonly known as Article II, Uniform Code of Military Justice, Sec. 4, providing:

> "The following persons are subject to this Code: . . .
>
> (4) Retired personnel of a regular component of the armed forces who are entitled to receive pay; . . ."

The issue of constitutionality of said section presented was whether or not it lay within the power of Congress to confer such jurisdiction in courts martial of the military services under Art. I, Sec. 8, Cl. 14, of the United States Constitution, providing:

> "The Congress shall have power. . . to make rules for the government and regulation of the land and Naval Forces; . . ."

Pursuant to Rule 12 of the Federal Rules of Civil Procedure, the District Court, on motion of Appellee, dismissed Appellant's first cause of action, (Clk's Tr. p. 70). Pursuant to Rule 56, Federal Rules of Civil Procedure, the District Court granted judgment for Appellee as to Appellant's second cause of action, (Clk's Tr., p. 70). Said judgment of dismissal on the first cause of action and in favor of Appellee on the second

cause of action, being final, jurisdiction to hear this appeal became vested in the above entitled Court pursuant to 28 U.S.C., Section 1291, 65 Stat. 726. Said District Court being within the circuit embraced by the above entitled Court as defined in 28 U.S.C., Section 1294, 65 Stat. 727, Appellant's appeal to the above entitled Court was duly perfected pursuant to Rule 73 of the Federal Rules of Civil Procedure within the time required by law, (Clk's Tr., p. 71).

STATEMENT OF CASE

Appellant was commissioned an officer in the United States Navy with the rank of Ensign, June 2, 1927. He thereafter served in the United States Navy until December 1, 1948, when Appellant was retired with the rank of Rear Admiral from the regular United States Navy. From December 1, 1948, Appellant received income from the United States Government as a retired officer of the United States Navy with the rank of Rear Admiral. (Findings of Fact 2, 5 and 6, Clk's Tr. pgs. 60-61).

In April, 1957, charges were filed with the Headquarters of the Eleventh Naval District, San Diego, California, under the Uniform Code of Military Justice, alleging Appellant committed offenses against said Code after December 1, 1948. (Findings of Fact 8, Clk's Tr. p. 62).

A general court martial was convened by order of the Appellee, C. C. Hartman, Rear Admiral USN, Commandant, Eleventh Naval District, San Diego, California, and on May 6th, and 7th of 1957, Appellant was

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tried on the alleged offenses, found guilty of some of the offenses, and ordered to be dismissed and forfeit all pay and allowances under said sentence of guilty, (Findings of Fact 9, Clk's Tr. p. 62).

Prior to the court martial, but subsequent to the ordering of Appellant to appear there, Appellant filed on May 2, 1957, in the United States District Court, in and for the Southern District of California, Southern Division, a Petition for a Writ of Prohibition against said court martial. On May 3, 1957, by order of said District Court, said petition was ordered dismissed, with leave to file an amended petition, (Clk's Tr. p. 3-4). Thereafter an amended complaint and petition for a writ of prohibition and for declaratory relief was filed in the District Court by Appellant on the 15th of May, 1957, (Clk's Tr. p. 4). Appellant's complaint in the second cause of action prayed for declaratory relief, pursuant to Title 28, U.S.C., Secs. 2201 and 2202, 68 Stat. 890, 62 Stat. 964. This remedy was invoked to determine the constitutionality of the statute conferring court martial jurisdiction upon the Armed Forces over retired officers of a regular component receiving pay, 50 U.S.C., Sec. 552 (4); 64 Stat. 109, Uniform Code of Military Justice Act, Sec. 2(4); said statute being hereinafter referred to as "UCMJ, Sec. 2(4)", (Clk's Tr. pgs. 13 - 16).

Appellant requested the appointment of a three-judge court to determine the constitutionality of UCMJ, Sec. 2(4), pursuant to 28 U.S.C., Sec. 2282; 62 Stat. 968, (Clk's Tr. p. 18). The District Court ruled there was no substantial question of constitutionality involved and therefore it was not required to convene a three-judge court, (Clk's Tr. p. 58).

The issue presented to the District Court was whether or not retired officers of a regular component of the Armed Forces, to wit: The Navy, entitled to receive pay, are persons within the land or naval forces of the United States within the meaning of Art. I, Sec. 8, Cl. 14, of the United States Constitution so as to allow the Congress of the United States to pass a statute conferring jurisdiction over such persons in a court martial of the United States Navy.

The District Court granted the Appellee's motion to dismiss Appellant's complaint as to the first cause of action, pursuant to Rule 12, Federal Rules of Civil Procedure, upon a determination no grounds for federal jurisdiction were alleged. Appellee's motion for summary judgment on Appellant's second cause of action, pursuant to Rule 56 of the Federal Rules of Civil Procedure, was granted and ruled the challenged statute to be constitutional, such judgment entered May 10, 1958 by the District Court is final.

SPECIFICATION OF ERRORS RELIED UPON ON APPEAL

Appellant hereby specifies the following errors as having occurred in the District Court:

1. The District Court erred in determining that Article 2(4) of the Uniform Code of Military Justice is constitutional.

2. The District Court erred in determining that the court martial had jurisdiction under Article 2(4) of the Uniform Code of Military Justice over a retired

officer of a regular component of the armed forces drawing pay, when said retired officer has never been recalled to active duty at any time prior to, during or subsequent to the court martial.

3. The District Court erred in determining that the pay of a retired officer of a regular component of the armed forces of the United States is not a pension, but that it is an emoluent of and dependent upon the office so held.

4. The District Court erred in determining and concluding that it is just and equitable to require Appellant to exhaust his military appellate remedies for direct review of the court martial and to all issues therein, when Appellant is seeking only a declaratory action judgment as to the constitutionality of the statute.

ARGUMENT

I

Article 2, Section 4, of the Uniform Code of Military Justice is unconstitutional.

It is undisputed that Appellant herein is a person as defined in Art. 2, Sec. 4 of the Uniform Code of Military Justice, 50 U.S.C., Sec. 552(4), 64 Stat. 109, the precedent of which was set out in 10 U.S.C., Sec. 802(4), 70A Stat. 641.

The District Court held that it had jurisdiction as to the second cause of action in Appellant's complaint so far as it requested a declaratory judgment as to the

constitutionality of the statute conferring jurisdiction, Findings of Fact 2 and 8, (Clk's Tr. p. 64 and 66). See also Memorandum Opinion of District Court, (Clk's Tr. p. 56).

Appellant was never confined and therefore habeas corpus was never available as a remedy for testing the jurisdiction of the court martial on the grounds the statute under which jurisdiction was asserted was unconstitutional.

The only cases upholding the precedent of UCMJ, Art. 2(4), are Closson vs. U.S., 7 App. D.C. 460, Murphy vs. U.S., 38 Ct. Cl. 511; and Runkle vs. U.S. 19 Ct. Cl. 396. Since the cases cited above were decided, the issue of courts martial jurisdiction over persons bearing some relation to the military, but not in active service in the military at the time of court martial, have received extended treatment by the United States Supreme Court.

The U. S. Supreme Court in U.S. vs. Quarles, 350 U.S. 11, and Reid vs. Covert, 354 U.S. 1, laid down a test to determine validity of congressional acts purporting to confer court martial jurisdiction over persons.

In the Reid case the court pointed out that a trial before a jury and civilian judge are fundamental rights, 354 U.S. 1.

The Court considered the fact the defendant could be tried for the offense other than by a court martial as persuasive, at Page 17. The court stated:

> "The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined."

Nor may the necessary and proper clause be used to extend military jurisdiction to a group of persons beyond that class described in Clause 14.

The court also stated:

> ". . . the jurisdiction of military tribunals is a very limited and extraordinary jurisdiction derived from the cryptic language in Article 1, Section 8, and, at most, was intended to be only a narrow exception to the normal and preferred method of trial in courts of law. Every extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and, more important, acts as a deprivation of the right to jury trial and of other treasured constitutional protections", Page 21.

The court noted that the exception in the Fifth Amendment to grand jury indictment for persons in the land or naval forces is persuasive that persons are not encompassed who cannot fairly be said to be "in" the military service, Page 22. Thus the court notes that by the very nature of a court martial its jurisdiction is to be construed in an extremely narrow manner and in determining who may be said to be "in" the military service, the court will give the word its narrowest possible construction. The court even noted that there was not any common law basis for the court martial of

ser vicemen in peace time, Pages 24 and 25.

In the same case the court again showed great concern with determining who are actually in the service within the meaning of the Constitution and pointed out that any arguments about necessity of jurisdiction over persons is immaterial, stating:

> "The Constitution does not say that Congress can regulate the land and naval forces and all other persons whose regulation might have some relationship to maintenance of the land and naval forces", Page 30.

They specifically rejected the government's argument that extension of the military jurisdiction over dependents of servicemen overseas was slight and that the need was great, Page 39. They specifically noted that even Winthrop pointed out in Military Law & Precedents (2d Ed. 1896, Page 145) that the Constitution does not recognize a third class of persons who are military for one purpose and civilian for another.

In U. S. vs. Quarles, 350 U. S. 11, the court pointed out that Congress may confer jurisdiction in a court martial over a person only under Art. 1, Sec. 8, Cl. 14, of the Constitution, granting Congress the power to make rules for government and regulation of the land and naval forces as supplemented by the necessary and proper clause. The court pointed out that the power to make rules "would seem to restrict court martial jurisdiction to persons who are actually members or part of the Armed Forces", Page 15. The court noted that a statute authorizing court martial trial of inmates of the Soldiers Home was ruled unconstitutional

by the Army's Judge Advocate General in Digest Opinions JAG (1912), Pages 1010, 1012.

In determining the scope of court martial jurisdiction it was noted that:

> "Unlike courts, it is the primary business of armies and navies to fight or to be ready to fight war should the occasion arise. But trial of soldiers to maintain discipline is merely incidental to an army's primary fighting function", Page 17.

Here again the court looked to the impact on military discipline of the event involved in determining whether jurisdiction was necessary in a court martial under the Constitution.

In both the Reid and Toth cases the Supreme Court noted the significance involved due to the large number of persons in the United States purportedly brought under court martial jurisdiction by the Uniform Code. In the Toth case the court noted that there were more than three million persons placed under the Code by the statute the government attempted to use to try Toth in Korea. In this case over 172,000 retired personnel are affected, (Appellee's Exhibits 6A - 6E, Clk's Tr. p. 46 - 50).

The court also noted as a significant factor in determining whether jurisdiction existed, the issue of whether or not the alleged defendant could be tried other than by a court martial, Page 21 of the Toth opinion.

In the Toth case the court states that in determining the scope of the constitutional power of Congress to authorize trial by court martial, there was presented another instance calling for, "limitation to the least possible power adequate to the end proposed", Page 23.

In both the Toth and Reid cases the court was unconcerned with ancient precedent, obviously because of the great change in the size of the military and the effect of granting jurisdiction that has occurred since the issue was passed on many years before. So in the Reid case the court overruled re Ross, 140 U. S. 453 as obsolete, and in the Toth case rejected re Bogart, 3 Fed. Cases 796 No. 1596 (C.C. Cal.). It is apparent that cases of long standing are not persuasive in the U. S. Supreme Court in re-evaluating the constitutional power of Congress to grant court martial jurisdiction to the military over persons today.

It is Appellant's contention that the rationale of the Toth and Reid cases exactly fits the case of plaintiff herein.

First: In the Toth and Reid cases the defendants had some relation to the military, being a former member in the Toth case and the dependent of an active member in the Reid case. The court pointed out that this relationship was not substantial enough to mean the person was in fact "in" the military service within the constitutional meaning, although recognizing that a relationship did exist directly to the military. So in plaintiff's case, as a retired member of the Armed Forces, there is a relationship, but it cannot be said that he is at present actually "in" the military service.

Second: The Supreme Court noted the status of the defendant at the time the alleged crime was committed. In the Toth case the defendant was actually a member at the time of the act and in the Reid case the dependent of a member actually in the service on duty, while in Appellant's case he was a retired member who had far less connection to the military service than the defendants in the Toth and Reid cases at the time the acts allegedly occurred.

Third: The Supreme Court took note of whether the defendants could be subject to punishment if they were not tried in a military court. In the Toth case and the Reid case neither defendant could be punished other than by a court martial, although it was pointed out Congress could cure this defect in the future. In plaintiff's case he was and is amenable to punishment in the courts of the State of California so that there is less necessity for jurisdiction over the Appellant than there was over the defendants in the Reid and Toth cases.

Fourth: The Supreme Court noted the relation of the offense of the defendant to the discipline of the armed forces and maintenance thereof. It specifically noted that such a consideration was important in determining jurisdiction, yet it struck down jurisdiction in both the Toth and Reid cases, although it made a finding that the relationship to discipline was great. It is obvious that in Appellant's case there is no relationship to military discipline since the alleged offense is a common law crime tryable in the state courts, see California Penal Code, Sec. 288a. The alleged act is neither factually nor actually related to the military nor maintenance of discipline therein.

Fifth: The court, in the Toth and Reid cases, gave great consideration to the effect of upholding the jurisdiction sought to be conferred on the military by the Uniform Code. In the Toth case they took specific note of the great number of ex-servicemen over whom jurisdiction could be asserted, and in the Reid case they took note of the large number of American dependents serving overseas. They found that the jurisdictional effect of the statute was great upon the civilian population of the United States. So in the Appellant's case we find an attempt to assert jurisdiction over every single member of the Armed Forces who is retired from regular status. The number of such persons exceeds 170,000. Obviously these retired persons have severed themselves from the military service, except for the requirement that they can be recalled to active duty in time of war or national emergency, 10 U.S.C., Sec. 6481, 70A Stat. 641. Their receipt of pay and certain medical benefits is a reward and right growing out of the active service previously rendered. It is certainly of common knowledge that the number of such persons over whom court martial jurisdiction can be asserted in the United States is great. If the act herein questioned is held constitutional, then every retired serviceman is a regular member of the Army, Navy or Air Force throughout his life and is subject to court martial jurisdiction for conduct in essentially civilian pursuits. Every retired Naval officer who receives a traffic ticket, or is charged with driving while intoxicated could be subject to court martial jurisdiction, sentence and imprisonment under the Uniform Code and the civilian courts ousted of their traditional and preferred jurisdiction over such crimes. It is the position of Appellant that the rationale of the U. S. Supreme Court in the Toth and Reid cases requires a holding that the act herein questioned is unconstitutional

and by every test for constitutionality set forth in the Toth and Reid cases, the need to strike down the statute is even greater in Appellant's case.

The relation of factors that were controlling in the rationale of the Toth and Reid cases to the case at bar can be graphically illustrated as follows:

	Toth	Reid	Hooper
(1) Relation of Defendant to Service	Former Member	Dependent of Member	Retired Member
(2) Status when crime committed	Member	Dependent of Member	Retired Member
(3) If no military jurisdiction, is punishment possible?	No	No	Yes
(4) Relation of Offense to Discipline	Great	Great	None
(5) Numbers affected if jurisdiction upheld	Great	Great	Great

The defendant indicates that because of the relationship of a retired officer to the Armed Forces, court martial jurisdiction is necessary. The Navy Department

publishes a bulletin for official circular letters to all ships and stations, and in Volume XI, No. 5, published September 15, 1947, it is stated therein at 47-864:

> "Retired officers are not required to hold themselves in readiness. They may be ordered to active duty in time of war or national emergency in the discretion of the Secretary of the Navy, but may be ordered to active duty in time of peace only subject to consent of the officer."

It would seem apparent from this official Navy statement of the law regarding retired officers that their connection with the military after retirement is extremely slight.

It is Appellant's position that the cases relied on to sustain court martial jurisdiction over retired regular personnel have been overruled by implication by the United States Supreme Court in the Toth and Reid cases. In fact, Tyler vs. U.S., 16 Ct. Cl. 223, Runkle vs. U. S.,19 Ct. Cl. 396, and Franklin vs. U.S.,29 Ct. Cl. 6, are not square holdings as to the constitutionality of the statute purporting to confer court martial jurisdiction in the military services over retired personnel. The Runkle case contains only dicta that retired officers are subject to court martial, because the question before the Court of Claims related to longevity for pay purposes. Runkle had been ordered to be tried by a court martial appointed by the President of the United States and sentence was later set aside, which caused the suit in the Court of Claims. Tyler vs. U.S. was merely a holding that retired officers are "in service" for certain pay purposes, but it is not a holding that such officers are "in service" for purposes of court

martial. Franklin vs. U.S. was also a question concerning pay of retired officers and not directly concerned with court martial jurisdictions. Thus the Court of Claims decisions are not only "stale" cases, so far as they relate to the factual picture today, but are not even holdings that the statute in question is constitutional for the purposes under consideration in the case at bar. The issue to finally be determined is whether or not the Appellant was "in" the military services within the meaning of the Constitution.

It is submitted that where Appellant has been retired from the military service for a number of years and is not on active reserve duty, he cannot be recalled to active duty other than under specified conditions which do not exist, and the alleged offense is a common law crime traditionally tryable by a civil court and is not of a nature to affect the military discipline of the services, that the Appellant is not within the military service within the meaning of the Constitution. Certainly if under the mandate of the Supreme Court, court martial jurisdiction is to be confined to a scope necessary to maintain proper discipline in the armed forces, there was no necessity for such jurisdiction over Appellant or other retired officers of a regular service, where their only connection to the service is retirement pay with the possibility of being recalled to service in time of a national emergency. For the foregoing reasons it is submitted that the statute in question is unconstitutional and was beyond the power of Congress under the Constitution of the United States.

II

The District Court Erroneously Determined That the Court Martial Had Jurisdiction Over a Retired Officer, When Said Retired Officer Was Never Recalled to Active Duty at Any Time Prior to or During Said Court Martial.

There appears to be no rational or legal argument that a retired officer is "on duty" in any sense, although he is, of course, entitled to certain benefits. The very fact that Congress has by 10 U.S.C., Sec. 6481, 70A Stat. 641, provided a means for ordering a retired officer to "active duty", necessarily implies that Congress considered a retired officer not "on duty". 10 U.S.C., Sec. 6481, 70A Stat. 641 provides:

> "In time of war or national emergency declared by the President, the Secretary of the Navy may order any retired officer of the regular Navy . . to active duty . . At any other time the Secretary may order such a retired officer to active duty . . . only with his consent."

The Armed Forces Reserve Act of 1952 (Act of July 9, 1952, 66 Stat. 481) defines duty as "military service of any nature under orders or authorization by competent authority." Thus duty is doing what is ordered by competent authority. If competent authority orders a person to stand trial, with the jurisdictional requisites, then it is his duty to do so. But what was the authority of the Commandant of the Eleventh Naval District to order a retired officer to duty? By 10 U.S.C., Sec. 6481, 70A Stat. 641,Congress provided that retired officers may not be ordered to active duty save in

time of war or national emergency and then only by the Secretary of the Navy. The order for the trial at bar was not issued by the Secretary of the Navy; consequently assuming arguendo the existence of a war or state of national emergency, the Commandant's order to stand trial was illegal unless the Secretary had delegated his authority to the Commandant. No such naval regulation or order can be found granting such delegation of authority.

In Pasella vs. Fenno, 167 Fed. 2d, 593, the Court of Appeals stated at Page 594:

> "We may take it for granted as the Appellant insists that the court martial was without power to try him unless the following conditions were met:
>
> 1. That he could lawfully be recalled to active duty for purposes of the court martial;
>
> 2. That he was subject to Naval law at the time of the theft and of his recall; and
>
> 3. That the offenses for which Appellant was tried fell within the category of 'cases arising in the land and Naval forces,' to which the Fifth Amendment requirement of presentment or indictment by grand jury does not apply. The relators status as a member of the Fleet Reserve therefore assumes primary importance and will first be considered . . . .
>
> . . . . Thus Appellant could lawfully be recalled to active duty, nothing in the statute or

> "legislative history indicating that a call to active duty solely for purposes of court martial proceedings is not permissible."

Why then did the Secretary of the Navy not order Appellant to active duty so as to avoid the question of whether or not Appellant was in the status allowing court martial at the time of trial? The answer is contained in Boscola vs. Bledsoe, and Smith vs. Thomas, 152 Fed. Supp. 343, affirmed, per curiam, by this Honorable Court, 245 Fed. 2d 955. In these cases both Boscola and Smith had completed 30 years of service in the Navy and been retired. Subsequently they were prosecuted by civil authorities and plead guilty, resulting in imprisonment in the Washington State Penitentiary for civil offenses committed after their retirement. On their release from the state penitentiary they were handed orders to active duty and taken into custody pending trial by military court martial for the state offenses for which they had been imprisoned. The District Court granted writs of habeas corpus on the theory that Congress in enacting 34 U.S.C., Sec. 433, 39 Stat. 591, (now 10 U.S.C., Sec. 6482, 70A Stat. 641) did not intend to permit ordering retired regulars to active duty solely to permit trial by court martial. 10 U.S.C., 6482, pertaining to the recall of retired and enlisted personnel, is practically verbatim the same as 10 U.S.C., 6481, pertaining to officers, and it thus follows that even the Secretary of the Navy could not have ordered Appellant to active duty to stand trial by court martial, (Findings of Fact 14, Clk's Tr. p. 63).

A reservist may not be recalled into the Navy after being released from active duty to give a Naval Court jurisdiction to try him for an offense committed while

in active service, U. S. vs. Naval Prison, 265 Fed. 787. An inactive member of the Naval Reserve is not subject to court martial, Viscardi vs. MacDonald, 265 Fed. 695.

It is the general rule that a person is amenable to military jurisdiction only during the period of his actual service, Ex Parte Drainer, 65 Fed. Supp. 410.

In Ex Parte Mulvaney, 82 F. Supp. 743, the court said:

> "but it does point to why upon these facts the Navy had no jurisdiction of the alleged crime for it is substantially devoid of military disciplinary significance. The sovereignty offended alone has the power and right to prosecute the accused for the substantive offense of rape committed within its exclusive jurisdiction. The incidental fact that the accused is a Navy man does not transfer this essential jurisdiction to the Navy courts, nor give it concurrent jurisdiction in the absence of an expression by Congress to that effect."

Contra: Pasella vs. Fenno, 167 F. 2d 593.

Since it follows that Appellant could be court martialed only if recalled to active duty, which never occurred, the constitutional question as to the statute conferring jurisdiction can be avoided. If it is assumed that being recalled to active duty makes Appellant a person "in the land or naval forces" within the meaning of the Fifth Amendment, still that was not the case at bar due to the failure to order Appellant to active duty. Thus the question of the constitutionality of Article 2(4)

of the U. C. M. J. can be avoided, along with the problem that the statute under the District Court's interpretation would permit any military commander to seize the person of any retired regular off the streets of the United States and thrust him before a court martial. Such a result is absurd and should be avoided because of the desire to avoid constitutional questions as to statutes where other grounds properly are before the court for determining the case at bar.

The issue of failure to recall Appellant to active duty for purposes of the court martial was plead and before the District Court, (Paragraph VI of Appellant's second cause of action, Clk's Tr. p. 12 - 13).

No valid reason appears why any distinction exists or should exist between officers who are retired from a regular component of the Armed Forces and a reservist who may not be recalled into the Navy after release from active duty in order to give a Naval court jurisdiction to try him for an offense, U. S. vs. Naval Prison, 265 Fed. 787. What possible distinction exists between Appellant and an inactive member of the Naval Reserve who is not subject to court martial, Viscardi vs. MacDonald, 265 Fed. 695; see also Ex Parte Mulvaney, 82 Fed. Supp. 743, and Ex Parte Drainer, 65 Fed. Supp. 410.

The highest law officers of the service themselves have held jurisdiction should not exist. An officer in inactive status may not be restored to active duty so as to prosecute him, 31 Opinions Attorney General 521; 4 JAG Bull. 35 (1946).

It is respectfully submitted that regardless of the

constitutionality of the section under which jurisdiction is claimed over Appellant, jurisdiction did not exist, due to the failure to recall Appellant to active duty for purposes of being court martialed. Not being on active duty at the time of said court martial, Appellant could not be said to be a person in the land or naval forces of the United States at the time of trial.

III

The Court Erroneously Determined Pay of a Retired Officer of a Regular Component of the Armed Forces of the United States Is Not a Pension or Annuity, But That It Is an Emolument of and Dependent Upon the Office So Held.

The act alleged to have been committed by Appellant occurred almost ten years after his retirement from the United States Navy. It is respectfully urged here that the portion of the sentence providing for total forfeiture was illegal, and the District Court should have so ruled, in that Appellant had a vested right in said retirement pay for military services previously rendered. Appellant was not performing any military service at the time of the alleged offense, nor at the time of the court martial. He was receiving a pension for military service performed long prior to the alleged offense. The compensation was for military services rendered in the past, and Appellant had previously satisfied all conditions required for the granting of the compensation which he was receiving.

The Navy's own interpretation as to retirement benefits of regular officers is persuasive. Vice

Admiral J. L. Holloway, Jr., of the U. S. Navy, whose affidavit is attached as an exhibit in the above action (Clk's Tr. p. 35 - 39), wrote a foreword to the "Navy Guide for Retired and Fleet Reserve Personnel", published in November, 1956, by the Department of the Navy, Bureau of Naval Personnel, in which the pay of retired naval officers is discussed, and therein Vice Admiral Holloway states:

> "Therefore, the material benefits outlined in this pamphlet are not gifts. They are rights that you have earned."

It would conclusively appear by his own statement that the Chief of Naval Personnel regards retired pay as a vested right, having been earned, and therefore not subject to forfeiture for subsequent acts. If retirement compensation were pay for being ready or prepared for recall to active service, why should such pay not be terminated upon an officer becoming totally disabled or mentally incompetent to the extent he would not be subject under any circumstances to recall for active service? The only reason is that the compensation paid to retired officers is a pension for services previously rendered and not pay for being "in" the Naval Forces.

It is therefore submitted that the District Court erroneously determined that retired officers' pay depended upon the office so held and was thereby subject to forfeiture should a court martial order the officer dismissed from the service.

IV

The District Court Erroneously Ruled That Appellant Must Exhaust Military Appellate Remedies for Direct Review of the Court Martial as to All Issues Therein Before Seeking Any Relief in the United States Courts.

There would be no question but that had Appellant been confined, he might by the use of habeas corpus in Federal Court, attack the jurisdiction of the court martial under the statute in question. However, habeas corpus is merely a collateral remedy and there is no reason why other collateral remedies should not be invoked to determine the same issue. Collateral attack, other than by habeas corpus on court martial jurisdiction, has been recognized, Shapiro vs. United States, 107 Ct. Cl. 650, 69 F. Supp., 205. Military courts are not courts within the meaning of Article III of the United States Constitution and thus the accused, Appellant herein, could not be required to submit to the judgment of a military court lacking jurisdiction of the person, Ex Parte Quirin, 317 U.S. 1. Courts martial are special statutory tribunals and their judgment is open to collateral attack. Unless facts essential to their jurisdiction appear, it must be held not to exist, Collins vs. McDonald, 258 U.S., 416. See also Reid vs. Covert, 354 U.S. 1; Toth vs. Quarles, 350 U.S. 11.

28 U.S.C., Sec. 2201, 68 Stat. 890 states:

> "Any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." (Emphasis added).

Rule 57, Fed. Rules of Civ. Proc. states:

> "The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate."

Thus it would seem clear that by virtue of the above statute and rule, Appellant's suit need not abate until military review of the conviction is final.

Appellant at no time sought any review of the court martial or as to how it was convened or conducted, or the occurrences or evidence submitted therein. Appellant has only requested a determination of the constitutionality of the statute under which jurisdiction was asserted. If there was no jurisdiction there was no valid court martial and it would be burdensome, time consuming and cause a circuity of actions to require Appellant to wait until the military appellate review as to the factual occurrences in the court martial were completed. The question presented the District Court was not one of guilt or innocence, nor one of a fair or unfair trial, but solely one of the constitutionality of a statute. The District Court ruled it had jurisdiction to hear such a suit. Appellant submits that having the jurisdiction to determine the constitutionality of the statute, the court did not have any equitable jurisdiction to refuse to determine the issues thus presented to the court.

A person may bring an action for declaratory judgment to prevent his deportation without awaiting arrest to allow the bringing of habeas corpus proceedings, McGrath vs. Kristensen, 340 U. S. 162. This is so even if the petitioner might have sued in an independent

proceeding under Section 10 of the Administrative procedure act to obtain judicial review, Id.

Injunctive relief may be granted under such a proceeding, Perkins vs. Elg, 99 Fed. 2d 408, and prohibition is a remedy which is available where there is no other adequate remedy, Poliszek vs. Doak, 57 Fed. 2d 430.

The remedy sought herein to test jurisdiction is proper since it has long been held that civil courts may, by appropriate proceedings, prohibit a court martial from trying a civilian, Ex Parte Henderson, 11 Fed. Cases 6349 (C. C. Ky. 1878). Whether a person is or is not in the Armed Forces must be determined by the civilian courts under the rules of due process, Robinson vs. Keating, 121 Fed. Supp. 477.

The problem of allowing the declaratory judgment to determine the propriety of deportation without awaiting arrest, or without pursuing the normal administrative remedies, is closely analogous to the problem herein of the right of Appellant to have the issue as to the constitutionality of the statute conferring jurisdiction determined prior to the determination of the court martial proceedings. See Toth vs. Quarles, 350 U.S. 11. The District Court below erroneously analogized the system of military appellate review to the state court system, and thus determined that the question should be resolved within that framework prior to bringing a suit in Federal Court. This ignores the fact that courts martial, unlike state courts, are special statutory tribunals without general jurisdiction and their judgment is open to collateral attack. Unless facts essential to their jurisdiction appear, it must be held not

to exist, Collins vs. McDonald, 258 U.S. 416.

The question of the remedies available to Appellant to compel the United States to continue retirement pay is so bound into the question as to the constitutionality of the statute conferring jurisdiction on the military to try Appellant, that the issues because of their inter-relation should have been determined together in the same action.

CONCLUSION

It is respectfully submitted that the District Court erroneously determined that U.C.M.J. 4(2) was constitutional. Further that the District Court properly should have avoided any determination of the constitutionality of said statute because Appellant, in any event, was court martialed without jurisdiction due to the failure of the Secretary of the Navy to recall Appellant to active duty as required by law.

It is further submitted that while the status of retired officers' pay presents a novel question, nevertheless equitable principles require that said pay be construed to constitute a retirement pension for services rendered and not pay subject to forfeiture after retirement.

The District Court properly ruled that it had jurisdiction to determine the declaratory action on the constitutionality of the statute, but erroneously determined that this jurisdiction should be postponed pending exhaustion of military remedies. Such a determination was based on the erroneous assumption that military

tribunals are courts of general jurisdiction akin to the state judicial systems, when in fact they are special statutory tribunals whose jurisdiction must affirmatively appear.

For the foregoing reasons it is respectfully submitted that the judgment of the District Court should be reversed with instructions to enter a declaratory judgment that the court martial is without jurisdiction due either to: (1) Failure to recall Appellant to active service or, (2) Because Article 2, Section 4 of the U.C.M.J. is unconstitutional.

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